

H.E. NO. 2018-10

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROSELLE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2016-212

ROSELLE ADMINISTRATORS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner denies the Respondent Roselle Board of Education's motion for summary judgment, following the issuance of a Complaint on an unfair practice charge filed by the Roselle Administrators Association. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4(a)(1) and (5), when it unilaterally changed the terms and conditions of an employee's employment, and then refused to negotiate compensation for those changes. The Hearing Examiner finds that material factual issues preclude granting the motion. The case must proceed to a plenary hearing.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Roth D'Aquanni, LLC, attorneys
(Allan C. Roth, of counsel)

For the Charging Party,
Schwartz Law Group, LLC, attorneys
(Robert M. Schwartz, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 11, 2016, the Roselle Administrators Association ("RAA") filed an unfair practice charge against the Roselle Board of Education ("Board"). The charge alleges that sometime in or after October, 2015, the Board refused the RAA's demand to negotiate compensation over newly added duties assigned to unit employee Karen Tanner-Oliphant, specifically, supervising and evaluating eight staff employees. The RAA represents a unit of principals, assistant principals, supervisors and directors employed by the Board, and Tanner-Oliphant serves as a supervisor of testing. The RAA alleges that the Board has refused to

negotiate any form of compensation to Tanner-Oliphant, and thus, the RAA asserts that the Board's unilateral change to Tanner-Oliphant's employment and its refusal to negotiate compensation for that change constitute a violation of 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

On May 4, 2017, the Director of Unfair Practices issued a Complaint and assigned the matter to me for a hearing. The Board filed an Answer to the Complaint on May 17, 2017. In its Answer, the Board denies violating sections 5.4(a)(1) and (5) of the Act, denies that Tanner-Oliphant was not responsible for supervision of staff until in or about October 2015, and states that Tanner-Oliphant was "required as part of her supervisory duties to perform evaluations of staff consistent with her job title, and other [Board] Supervisors." In its Answer, the Board denies that the RAA sought to negotiate compensation with the RAA, and "states that it stands ready to negotiate with the [RAA]." The Board also denies that it "refused to negotiate any form of compensation."

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act;" and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On September 7, 2017, the Board filed a Motion for Summary Judgment pursuant to N.J.S.A. 19:14-4.8, together with a certification, exhibits and a brief, arguing that Tanner-Oliphant's duties already included supervising staff members and performing staff evaluations, and therefore it did not unilaterally change any of the terms and conditions of her employment, and also that the RAA had an opportunity to negotiate for additional compensation, but failed to do so.

On September 25, 2017, the RAA filed a response to the motion for summary judgment, together with certifications, exhibits and a brief.

On September 26, 2017, the Commission referred the Motion to me for a decision. N.J.A.C. 19:14-4.8. I have conducted an independent review of the parties' briefs and supporting documents submitted in this matter. Based upon the record, I make the following undisputed

FINDINGS OF FACT

1. The Board and RAA are, respectively, public employer and public employee representative within the meaning of the Act.

2. The Board and RAA are parties to a collective negotiations agreement ("CNA") effective from July 1, 2012 through June 30, 2017.

3. The RAA represents principals, assistant principals, supervisors and directors employed by the Board.

4. Tanner-Oliphant serves as a supervisor of testing, and is included in the negotiations unit represented by the RAA.

5. Mark Tabakin certifies that he is counsel to the Board, and he attended and participated in collective negotiations on its behalf with RAA representatives.

6. Negotiations for the current CNA between the parties took place on various dates beginning on August 24, 2014 through April 13, 2016. The CNA was mutually executed in April, 2016. That agreement is included as an exhibit.

7. The Board submitted an approved "Supervisor of Testing K-12" job description as an exhibit, which sets forth a list of duties, including a "Job Goal" which is "[t]o direct and monitor an ongoing program of student assessment and testing and to improve overall student performance on standardized tests, district wide." This job description also states that the Supervisor of Testing "[s]upervises: Personnel as assigned."

8. The "Supervisor of Testing K-12" job description also states that one of the "Performance Responsibilities" of the Supervisor of Testing is to, "[s]erve[] as a member of the district's evaluation team," but does not include any additional information about the duties or responsibilities of the district's evaluation team. However, another one of the "Performance Responsibilities" is to "[e]valuate[] on an ongoing basis the system's testing programs." This job description

further states that the Supervisor of Testing "[p]erforms other duties as assigned or required by law and code."

9. The Board submitted an approved "Department Chairperson (Supervisor)" job description as an exhibit. That job description states that one of the "Performance Responsibilities" of a Department Chairperson (Supervisor) is to "[o]bserve[] and evaluate[] all assigned staff."

10. Tanner-Oliphant is employed as the Supervisor of Testing K-12. She was part of the RAA negotiations team and participated in the collective negotiations for the 2012-2017 CNA.

11. Tanner-Oliphant certifies that she was promoted to the position of Supervisor of Testing K-12 in or about 2008, and from 2008 until in or about October 2015, she "did not evaluate any staff members," but instead "evaluated the programs associated with testing in the district." Tanner-Oliphant further certifies that she was "assigned evaluative duties for the first time in [her] capacity as the supervisor of testing in or about October 2015," but "[t]he staff [she] was assigned to evaluate were not a part of [her] department."

12. Tanner-Oliphant certifies that the "new evaluation component which had been assigned" to her had the following schedule:

- (1) By November 13 complete a co-observation of staff assigned;

- (2) By December 7 complete the first observations;
- (3) By January 29th have mid-year conferences with teachers for CAPs;
- (4) By February 12 conduct the second observation of staff;
- (5) By March 4 conduct the second co-observation;
- (6) By April 22 conduct the 3rd observation of non-tenured staff and complete annual summative evaluation and conference for non-tenured staff;
- (7) By May 13 conduct 3rd observation of tenured staff;
- (9) By June 10 have all annual/summative evaluations for tenured staff.

Tanner-Oliphant further certifies that "[p]rior to the 2016-2017 school term," she "did not perform these duties in [her] capacity as supervisor of testing."

13. The RAA also submits the Certification of Marilyn Hawthorne in opposition to the Board's motion. Hawthorne certifies that she "serve[s] as a field representative for the New Jersey Principals and Supervisors Association (NJPSA)," and she was assigned in 2014 to assist the RAA with contract negotiations for a successor agreement, as the previous contract had expired on June 30, 2012. Hawthorne certifies that although the RAA had attempted to negotiate on its own, after "more than three years of unsuccessful negotiations," the RAA requested assistance from the NJPSA, and Hawthorne "was then assigned."

ANALYSIS

Summary judgment must be denied if material factual issues exist. Brill v. Guardian Life Ins. Co. Of Am., 142 N.J. 520, 529

(1995); Judson v. Peoples Bank & Trust Co. Of Westfield, 17 N.J. 67, 74-75 (1954). In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

Employers may unilaterally assign duties if they are incidental to or comprehended within an employee's job description and normal duties. See, e.g., Tp. of West Orange, P.E.R.C. No. 2007-21, 32 NJPERC 331 (¶138 2006) (police officers required to fuel their patrol cars); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985)(fire officers required to perform crossing guard or patrol duties connected to fires); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984) (bus drivers required to pump gas); West Orange Tp., P.E.R.C. No. 83-14, 8 NJPER 447 (¶13210 1982)(firefighters required to go on fire patrols).

In its motion, the Board argues that it did not unilaterally change the terms and conditions of Tanner-Oliphant's employment, and that it did not subsequently refuse to negotiate compensation for any alleged changes to Tanner-Oliphant's employment. With regard to its first argument that it did not unilaterally change the terms and conditions of Tanner-Oliphant's employment, the Board argues that although the Board informed Tanner-Oliphant "in or about October 2015 . . . that she was required to perform staff member evaluations," that request was not a change to the terms and conditions of her employment, because Tanner-Oliphant "was required under the Supervisor of Testing Job Description and the District's general Supervisor job description to evaluate staff members." Thus, the issue in this motion is whether the Board has proven, at this juncture, that as a matter of law, evaluating staff members is a duty that may be unilaterally assigned.

The Board relies upon the Tabakin Certification in support of its argument that Tanner-Oliphant was required "to evaluate staff members." In that Certification, Tabakin attaches a copy of the Board's "Supervisor of Testing K-12" job description, and a copy of the Board's "Department Chairperson (Supervisor)" job description. However, neither "evaluating staff members," nor any similar language, appears in the "Supervisor of Testing K-12" job description. The closest that any language in this job

description comes to "evaluating staff members" is that one of the "Performance Responsibilities" is to "[s]erve[] as a member of the district's evaluation team." However, there is no additional language describing the duties or responsibilities of the "evaluation team," and so it is not clear from the job description what the "evaluation team" evaluates.

And notably, as another one of the "Performance Responsibilities" is to "[e]valuate[] on an ongoing basis the system's testing programs," it is even less clear from the job description whether the "evaluation team" evaluates staff or evaluates testing programs. Finally, although this job description also states that the Supervisor of Testing supervises "[p]ersonnel as assigned," Tabakin does not certify to or include any information about whether Tanner-Oliphant has ever been assigned employees to supervise, and if so, whether Tanner-Oliphant ever evaluated those employees as part of her supervision.

Tabakin also attaches a copy of the Board's "Department Chairperson (Supervisor)" job description to his Certification, which states that one of the "Performance Responsibilities" of a Department Chairperson (Supervisor) is to "[o]bserve[] and evaluate[] all assigned staff." However, it is not clear from either the Tabakin Certification or either of the two job descriptions whether the "Supervisor of Testing K-12" is a

"Department Chairperson (Supervisor)". Specifically, neither the "Supervisor of Testing K-12" job description, nor the "Department Chairperson (Supervisor)" job description states that the Supervisor of Testing K-12 is a Department Chairperson.

Thus, there are material issues of fact regarding whether Tanner-Oliphant as Supervisor of Testing K-12 evaluates staff members that are not resolved by the Tabakin Certification and the two job descriptions alone.

Furthermore, the RAA submits the Tanner-Oliphant Certification, which also directly refutes the Tabakin Certification regarding whether the Supervisor of Testing K-12 evaluates staff members. In her Certification, Tanner-Oliphant certifies that she was promoted to the position of Supervisor of Testing K-12 in or about 2008, and from 2008 until in or about October 2015, she "did not evaluate any staff members," but instead "evaluated the programs associated with testing in the district." Tanner-Oliphant further certifies that she was "assigned evaluative duties for the first time in [her] capacity as the supervisor of testing in or about October 2015," but "[t]he staff [she] was assigned to evaluate were not a part of [her] department." Tanner-Oliphant further certifies that the "Board consistently took the position that it had the right to assign to [her] the additional evaluative duties of staff," despite the fact that "they had never been part of the job of

supervisor of testing," and despite the fact that "the teachers [she] was to observe and evaluate had not previously been under [her] supervision."

With regard to the issue of whether the Board refused to negotiate compensation for any alleged changes to Tanner-Oliphant's employment, the Board's arguments in its brief and the Tabakin Certification include a few different positions. First, Tabakin certifies that, "[a]t no time during this salary discussion, did [Tanner-Oliphant] or any other RAA representative discuss specifically the issue of additional compensation or a new stipend based upon [Tanner-Oliphant's] conducting staff evaluations." Further, Tabakin certifies that "[a]t no time during negotiations did RAA submit a proposal requesting additional compensation for [Tanner-Oliphant] for conducting staff evaluations."

Then the Board argues that it did not refuse to negotiate, as "in or about October 2015," the RAA and the Board "engaged in negotiations of RAA members, including" Tanner-Oliphant, and neither Tanner-Oliphant, "who was at the negotiations table, nor the RAA negotiations representative, requested a salary increase or stipend based upon [Tanner-Oliphant's] obligation to perform staff member evaluations."

And then, the Board argues that "[f]or purposes of this motion, the [Board] will accept as true that [Tanner-Oliphant]

engaged in protected activity by requesting . . . negotiation of her compensation for her duties and assignments as Supervisor of Testing." Thus, the Board argues, the "discussions that followed . . . are fatal to the RAA's charge," as the Board "then continued to negotiate in good faith the compensation for all of its RAA member employees, including [Tanner-Oliphant]." Thus, the Board argues that this charge "is nothing more than a second bite at the apple, in which the RAA seeks a better deal for [Tanner-Oliphant] than that to which it agreed during negotiations."

RAA relies upon Tanner-Oliphant's Certification to refute the Board's allegations regarding whether the Board refused to negotiate. Tanner-Oliphant certifies that although she "was on the negotiating team that developed the current contract," the agreed-upon increases "did not include any monies for the additional duties that were first assigned to me in October 2015." Tanner-Oliphant certifies that the RAA negotiating team "pursued separately from negotiations the issue of the additional assignment given to [her] because we did not want further delay" to what "had become more than a 3-year marathon of negotiations." She further certifies that the Board "consistently refused to negotiate over this issue - the extra evaluative duties assigned - which is why we filed the ULP."

Additionally, on behalf of the RAA, Hawthorne certifies that the RAA and the Board agreed to a memorandum of understanding on November 4, 2015, but that agreement "did not address the issue relating to the additional evaluative duties that had been assigned to Ms. Tanner-Oliphant a few weeks earlier," in or about October 2015. Hawthorne further certifies that the RAA agreed to the memorandum of understanding with the Board "because we did not yet have a handle on the full impact of the evaluative assignment Ms. Tanner-Oliphant received in October given that the first co-observation of the new evaluative duties wasn't going to take place until November, 2015." Hawthorne also certifies that, "[w]e also did not want to delay the conclusion of negotiations, given that they had been on-going for over three years during which time members of the RAA had not seen a raise since the end of the last contractual term on June 30, 2012."

Hawthorne further certifies that although Tabakin, "in his certification, speaks of negotiations that continued through April 2016," the discussions after the November 4, 2015 memorandum of understanding, "pertained to the salary guide only." Thus, Hawthorne certifies that, "[a]lthough the negotiated salary increases were largely done before anyone knew of the additional evaluative duties, our thoughts were that separate from the salary guide issue we would continue to pursue separately the issue of compensating Ms. Tanner-Oliphant," which

the RAA did, "but to no avail." Hawthorne further certifies that, "[d]espite our best efforts, the Board . . . continued to refuse to negotiate extra compensation for the extra duties assigned to Ms. Oliphant."

Thus, with regard to the Board's motion for summary judgment, the Board and the RAA have submitted conflicting Certifications on the two underlying factual issues regarding whether the Board unilaterally changed the terms and conditions of Tanner-Oliphant's employment when it assigned her evaluative duties, and then whether the Board refused to negotiate compensation for that change.

Under these circumstances, I find that the Board has not met its burden of proving that it is entitled to relief as a matter of law, and summary judgment is denied. The matter must proceed to a plenary hearing.

RECOMMENDED ORDER

The Board's motion for summary judgment is denied.

/s/ Lisa Ruch
Lisa Ruch
Hearing Examiner

DATED: April 26, 2018
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.8(f), this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by May 3, 2018.